(24)

No. 1021 78, 79

In the Supreme Court of the United States

CLARENCE CALDWELL ..... Petitioner

vs.

THE TRAVELERS INSURANCE COMPANY ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS B. PRYOR,
THOMAS B. PRYOR, Jr.,
Counsel for Petitioner.

G. BYRON DOBBS,
HUGH M. BLAND,
of Counsel.

INDEX

Petition for Writ of Certiorari

Brief in Support of Petition

Table of Authorities Cited

CASES

STATUTES CITED

In the Supreme Court of the United States

CLARENCE CALDWELL ..... Petitioner

vs.

THE TRAVELERS INSURANCE COMPANY ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MAY IT PLEASE THE COURT:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The inception of this litigation was the serious personal injury sustained by the petitioner, Clarence Caldwell, on the 3rd day of October, 1938, by a motor vehicle in the city of Fort Smith, Arkansas.

According to the allegations of the complaint, which he filed in the State Court against the Black and White Transfer Company, a Corporation, and others (R. 5) "he was rendered unconscious and remained unconscious for a period of nine (9) days; that his face and throat were cut from ear to ear; that his right jaw bone was broken, making it necessary to remove two (2) inches of said bone; that his right arm was cut from his wrist to above

the elbow, which required forty-seven (47) stitches to close; his right leg was broken in nine (9) places between the ankle and the knee, and the flesh and ligaments torn and the bone extended therefrom; that his left leg was broken in eleven (11) places between the ankle and the knee, and the skin, flesh and muscles of his body were torn, lacerated and bruised, and his body otherwise bruised and injured; that he suffered and still suffers great and excruciating pain, and was confined to his bed for a period of approximately twelve (12) months, at St. Edwards Hosiptal in Fort Smith, Arkansas.

" * * * he has become greatly disfigured by reason of the loss of the majority of his right jaw bone; that the injuries to his right leg has caused his right foot to become numb and said plaintiff is required to wear a brace; that his left leg is weak and permanently injured; that his ability and capacity to earn a livelihood and support his family has been thereby permanently and seriously impaired."

The complaint filed by the petitioner in the State Court alleged that the defendant Black and White Transfer Company, a Corporation, and the other defendants were jointly operating the vehicle which caused his injuries, and a verdict and judgment were rendered on October 30, 1941, against the Black and White Transfer Company, a Corporation, and other defendants, in favor of the petitioner herein, in the sum of Fifteen Thousand Dollars ($15,000.00). (R. 11)

An execution was issued on the aforesaid judgment on the 4th day of December, 1941, and a return of the

Sheriff thereon that he made diligent search and failed to find any unencumbered property in the then named defendants upon which to levy. (R. 11) Thereafter, and on the 11th day of December, 1941, a suit for a declaratory judgment was filed in the United States District Court for the Western District of Arkansas, Fort Smith Division, in which it was alleged that the respondent herein, The Travelers Insurance Company, had a liability policy in force, at the time of petitioner's injury, insuring the operation of the Black and White Transfer Company, Inc., pursuant to the statutes of the state of Arkansas and the order of the Arkansas Corporation Commission requiring such insurance coverage. (R. 2)

The respondent, hereinafter referred to as the insuranace company, filed an answer to the complaint (R. 12) and alleged that the judgment against the Black & White Transfer Company, Inc., and others was not a final determination of the liability of the Black & White Transfer Company, Inc., for the reason that the said Black & White Transfer Company, Inc., had prayed and been granted an appeal from the judgment rendered against it in favor of the plaintiff; that it, The Travelers Insurance Company, was not a party to said suit and was not notified by the Black and White Transfer Company, Inc., of said suit as required by the policies herein sued upon and that it did not know that said suit was pending until the plaintiff's attorney made demand upon it on account of said judgment; that plaintiff was not entitled to recover a judgment against the Black and White Transfer Company, Inc., and that the evidence introduced by the plaintiff in said suit was insufficient to support the verdict and judgment rendered therein; that should the Supreme Court of Arkansas

affirm the judgment rendered in favor of the plaintiff against the Black and White Transfer Company, Inc., then will arise a controversy between the plaintiff and this defendant on the issue of the coverage of the liability incurred by the Black and White Transfer Company, Inc., but that until the Supreme Court of Arkansas determines the appeal there is no liability established against the Black and White Transfer Company which could be a basis for the suit against the defendant.

The defendant prayed that the action be dismissed because no controversy exists between plaintiff and it.

The defendant further alleged that assuming the taxi-cab which struck the plaintiff was owned by the Black and White Transfer Company, Inc., and driven by one of its employees, that the insurance referred to does not cover the taxicab because the Black and White Transfer Company, Inc., was operating under a certificate granted by the Arkansas Railroad Commission to operate a motor freight transportation line in Arkansas as an irregular common carrier in intrastate freight of specified commodities consisting of used household goods, used machinery and tools and store fixtures over certain designated routes within the State.

That the defendant issued to the said Black and White Transfer Company, Inc., its policy No. FA-1109020 pursuant to paragraph (e) of Section 6 of Act 99 of the Acts of 1927 and described the vehicles to be used in said business, which vehicles were trucks, a trailer and a tractor as a condition precedent to issuing of the certificate commonly called a permit, and made thereupon the statutory endorsement required by law; that said

endorsement waived a description of the vehicles to be used in the business and is limited to injury caused by any and all motor vehicles operated by assured pursuant to certificate issued by the Railroad Commission; that the taxicab by which the plaintiff was injured was not operated in the business which the certificate authorized the company to operate; that the operation of any other line than authorized by said certificate made such company (Black & White Transfer Company, Inc.,) or any individual so doing, guilty of misdemeanor and punishable by said paragraph (e) of Section 6 of Act 99 of the Acts of 1927.

That policy No. FA-1109209 was not a statutory policy, but a contractual policy supplementary to the statutory policy, and was not required to contain the statutory endorsement; that said policy limited its coverage to operations authorized in the certificate and limited it to vehicles specified herein, consisting of vans, tractor and a one-ton semi-trailer; that said policy is not applicable to any injury received by the plaintiff by riding in another vehicle of the Black & White Transfer Company, Inc., other than those mentioned and described in Rider No. 1587.

That each of the policies referred to in the complaint contained a provision under the caption "exclusions" as follows:

> "This policy does not apply (a) under any of the above coverages, while the automobile is used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying persons for a consideration, or while rented under contract or

lease, unless such use is specifically declared and described in this policy and premium charged therefor."

That the taxicab driven by Monty Robinson at the time of the injury to the plaintiff was used by its owner as a public conveyance and for carrying passengers for a consideration and was excluded from said coverage; that no premium was paid to the defendant covering any such liability as herein sued for.

That the proceedings in the Sebastian Circuit Court, Fort Smith District, are not relevant to the issues herein in that the issues therein raised and determined were the ownership of the taxicab and the operation thereof by Monty Robinson, whether negligent or not, and the conduct of the plaintiff; that this defendant was not a party thereto and had no knowledge of said suit while it was pending, but was entitled to notice of the pendency of said suit; that there was no issue raised or determined therein as to the coverage for the injuries therein sued upon and no issue could have been properly raised therein; that said issue is raised for the first time in this complaint wherein the plaintiff alleges that the policies did cover liability for his injuries and that is an issue now presented for the first time.

That it denies liability to the plaintiff for any amount and in the alternative alleges that if there is any liability it is limited under policy No. FA-1109020 to $5,000.00; that policy No. FA-1109209 is not applicable to the injuries sued upon.

By an amendment filed January 28, 1942, to the an-

swer, it is alleged that the Black & White Transfer Company, Inc., was not the sole owner of the taxicab driven by Monty Robinson which caused the injury to the plaintiff and that both policies contain a provision that the insured is the sole owner of the automobile and that the term "automobile" used in the policy is defined to be "the motor vehicle, trailer or semi-trailer described in the policy."

That the statutory endorsement attached to Policy No. FA-1109020 did not alter, change or modify the declaration that the vehicle covered by the insurance and causing the injury was solely owned by the assured.

The undisputed evidence in the record discloses that the insurance company on April 5, 1938, by letter, forwarded to the Public Service Commission of the state of Arkansas, an insurance binder (R. 20) furnishing insurance coverage in the amount of $25,000 for one person, "in accordance with the requirements of your department." The binder was filed on April 7 (R. 22) and provided that it should terminate "by issuing to the employer or assured named as such in the binder schedule a duly executed policy or policies."

Under date of April 28, 1938, the Arkansas Corporation Commission received a letter (R. 23) purporting to enclose policies No. FA-1109020 and FA-1109209, supplanting the binder which had theretofor been filed as per the requirements of the Arkansas Corporation Commission. The policies referred to in the letter are found as Exhibits 3 and 4 (R. 23-34). In each of these policies the Black and White Transfer Company Inc., was desig-

nated as the insured. The occupation of the insured was stated as "Furniture Mover." The description of the automobiles covered in policy No. FA-1109209 are two, two-ton vans; one, one and a half ton tractor and one, one-ton semi-trailer, all for commercial uses. In Policy No. FA-1109020, the same automobiles are described, together with the addition of a rider, No. 2707, providing for other automobiles not owned by the insured, but which might be hired by insured in the prosecution of its work.

Attached to policy No. FA-1109020 is the endorsement required by subsection (e) of section 2025 of Pope's Digest of the Statutes of Arkansas, reading as follows:

> "The policy to which this endorsement is attached is written in pursuance of and is to be construed in accordance with an Act of the General Assembly of the State of Arkansas for the year 1927, entitled, 'An Act to provide for the regulation, supervision and control of motor vehicles used in the transportation of persons or property for compensation in the State of Arkansas, and for other purposes,' and amendments thereto; and with the rules and regulations of the Corporation Commission of the State of Arkansas. Policies to be filed with the said Commission in accordance with said statute.
>
> "In consideration of the premium stated in the policy to which this endorsement is attached, the company hereby waives a description of the motor vehicles to be insured hereinunder, and agrees to pay any final judgment for personal injury, including death, resulting therefrom and or damage to property, other than assured, caused by any and all motor vehicles operated by the assured, pursuant to a certificate issued by the Corporation Commission of the State of Arkansas within the limit set forth in the schedule shown hereon, and further agrees that upon its failure to pay any such final judgment such judg-

ment creditor may maintain an action in any court of competent jurisdiction to compel such payment. Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof, by the assured shall relieve the company from liability hereunder or from the payment of any such judgment."

The schedule immediately following this endorsement provides:

"On each motor vehicle used for the transportation of property, not to exceed: $5,000.00 for any recovery for personal injury by any person, $10,000.00 for all persons receiving personal injury by reason of one act of negligence, and not to exceed $1,000.00 for damage to property of any person other than the assured.

"On each motor vehicle used for the transportation of persons, having passenger capacity of twelve passengers or less, not to exceed: $5,000.000 for any recovery for personal injury by one person; $10,000.00 for all persons receiving personal injury by reason of one act of negligence; and not to exceed $1,000.00 for damage to property of any person other than the assured."

Attached to and as part of policy No. FA-1109209 was Rider No. 2643, reading as follows:

"Excess Insurance Endorsement—Amending Policy No. FA-1109209.

It is agreed that such insurance as is afforded by the policy for bodily injury liability applies subject to the following provisions.

1. If bodily injury occurs with respect to which insurance is afforded under policy No. FA-1109020 (herein referred to as 'Statutory Policy') the insurance thereunder shall first be applied and the limits of liability thereunder shall first be fully exhausted before any of the limits of liability under this policy shall apply.

2. The limits of liability expressed in said statutory policy are included in the limits of liability applicable to this policy and are not in addition thereto."

The assured, Black & White Transfer Company, Inc., had obtained on October 5, 1937, a permit to operate a motor freight transportation line in Arkansas, as a common carrier, and was granted a certificate authorizing it as an irregular common carrier of intrastate freight of special commodities, consisting of used household goods, used machinery and tools, and store fixtures, over designated routes, four of which ran through the City of Fort Smith (R. 52).

Although the judgment entered in the State Court necessarily decided as an issue the fact that the assured, Black and White Transfer Company, Inc., was operating the vehicle at the time of this petitioner's injuries; and although the insurance policy, as required by the laws of the state of Arkansas, waived description of the assured's vehicles, and further provided: "Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof, by the insured, shall relieve the company from liability hereunder or from the payment of any such judgment", (R. 32) - - - the insurance company in the declaratory judgment suit attempted to reopen the question of agency of the driver of the vehicle and attempted to raise policy defenses that were clearly waived by the terms of the statutory endorsement.

The testimony in the case was that the dispatcher for the Black & White Transfer Company, Inc., received

a call for a pick-up truck to transfer some tools, or things (R. 35) and since a truck was not available, a cab of the Drivers Owners Ass'n., which was owned and operated by the same officers, was dispatched to take care of the job. The cab driver in addition to hauling the tools and the owner of the tools, had delivered a regular cab passenger, apparently for the cab company, prior to the accident (R. 37).

The oral testimony of witnesses raised some issues of fact in this connection but the trial court decided those issues in favor of the petitioner and on the 10th day of June, 1942, entered judgment in favor of the petitioner against the insurance company (R. 83) holding that the insurance company "is liable to the plaintiff for the amount of the judgment, interest, and costs obtained in and entered in the Sebastian Circuit Court, Fort Smith District, in the case of Clarence Caldwell v. Black & White Transfer Company, et al., up to but not exceeding the sum of $25,000.00 under and by virtue of the policies of insurance issued by the Travelers Insurance Company."

The court filed a written opinion (R. 60) setting out his findings of fact and conclusions of law. From this judgment an appeal was taken by the insurance company to the Circuit Court of Appeals, Eighth Circuit; and on February 15, 1943, that court delivered an opinion (R. 89) reversing the District Court, primarily on the ground that the vehicle which brought about the serious injuries to the petitioner, was not being operated at the time of the accident within the limits of its certificate of convenience issued by the Arkansas Corporation Com-

mission. Petition for rehearing was filed March 2, 1943, (R. 105) and was denied March 15, 1943 (R. 109).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Circuit Court of Appeals erred in construing the policies of insurance involved herein contrary to the express provisions of the Arkansas State Statute requiring such insurance.

2.

The Circuit Court of Appeals erred in failing to construe the policies of insurance involved herein liberally in favor of the beneficiary, and strictly against the insurance company, contrary to the decisions of the Supreme Court of the State of Arkansas, the rule in Arkansas being well settled that insurance policies are to be construed strictly against the insurance company.

3.

The Circuit Court of Appeals erroneously assumed contrary to the findings of fact of the District Court and the evidence introduced in the case, that the vehicle which struck and severely injured the petitioner was being operated as a taxicab and not in the transportation of intrastate freight; and from this erroneous premise found that the vehicle was not being operated at the

time of the accident pursuant to the certificate of convenience and necessity.

4.

The Circuit Court of Appeals erroneously found, contrary to the evidence and findings of fact by the District Court, that the Black and White Transfer Company, Inc., was not operating pursuant to its certificate of convenience and necessity at the time of the accident.

5.

The Circuit Court of Appeals erred in holding that only $5,000.00 insurance was required by the Arkansas Corporation Commission, whereas the record discloses that $25,000.00 were the "requirements of the department."

6.

The court erred in holding that policy defenses which the insurance company would have as against the Black and White Transfer Company, Inc., were available as against petitioner, contrary to the language and spirit of the laws of the state of Arkansas, as well as the decisions of the Appellate Court of that state, and contrary to the decisions of other Federal courts.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this

Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 12,399, The Travelers Insurance Company, appellant, v. Clarence Caldwell, appellee, and that said decree of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

SIGNED T. B. PRYOR, JR.

SIGNED THOS. B. PRYOR

Counsel for Petitioner.

G. BYRON DOBBS,
HUGH M. BLAND,
of Counsel.